COMMONWEALTH OF KENTUCKY

CHRISTIAN CIRCUIT COURT
Indictment No. 02-CR-00280

COMMONWEALTH OF KENTUCKY, *Plaintiff,*

v.

ROGER ALAN BERKE, *Defendant.*

JUDGMENT AND SENTENCE ON PLEA OF NOT GUILTY (Jury Trial)

Entered: September 4, 2003

The Defendant, at arraignment, entered a plea of not guilty to the following charges contained in the indictment(s):

DATE	CHARGE
Between 1-1-95 to 6-9-97	Use of a Minor in a Sexual Performance, 18 counts
7-15-02	Tampering with Physical Evidence

These offenses were committed when the Defendant was between 49 years of age and 57 years of age. The Defendant's date of birth is August 7, 1945.

And on the day of August 4, 2003, having appeared in open court with his attorney Honorable Richard Kip Cameron the case was tried before a jury which returned the following verdict:

Not Guilty of Use of a Minor in Sexual Performance, 18 count and Guilty of Tampering with Physical Evidence

On the 3rd day of September, 2003, having appeared in open Court with counsel, Honorable Richard Kip Cameron, and the court inquired of the defendant and his attorney whether they had a legal cause to show why judgment

should not be pronounced, and afforded the defendant and his attorney the opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and the court having informed the defendant and his attorney of the factual contents and conclusions contained in the written report of the presentence investigation prepared by the Division of Probation and Parole and provided defendant's attorney with a copy ofthe report although not the sources of confidential information, the defendant agreed with the factual contents of said report. Having given due consideration to the written report of the Division of Probation and Parole and to the nature and circurnstances of the crime, and to the history, character and condition of the defendant, the court is of the opinion:

✓ that imprisonment is necessary for the protection of the public because:

- ✓ A. There is a substantial risk that the Defendant will commit another crime during any period of probation, probation with an alternative sentencing plan, or conditional discharge.
- ✓ B. The Defendant is in need of correctional treatment that can be provided most effectively by the Defendant's commitment to a correctional institution.
- ✓ C. Probation, probation with an alternative sentencing plan, or conditional discharge would unduly depreciate the seriousness of the Defendant's crime.
- ____ D. The Defendant is not eligible for probation, probation with an alternative sentencing plan, or conditional discharge because of the applicability of KRS 532.080 or KRS 533.060.

✓ that the Defendant is eligible for probation, probation with an alternative sentencing plan, or conditional discharge as hereinafier ordered.

No sufficient cause having been shown why judgment should not be pronounced, IT IS ADJUDGED BY THIS COURT that the Defendant is guilty of the following charge(s):

Tampering with Physical Evidence

AND IS SENTENCED TO:

5 years

It is further ORDERED that the Defendant be delivered to the custody of the Corrections Cabinet at such location within this Commonwealth as the Cabinet shall designate unless specified otherwise above.

It is further ORDERED that the Defendant is hereby credited with time spent in custody prior to sentence, namely 416 days as certified by the jailer of Christian County towards service of the maximum term of imprisonment (or toward payment of a fine at the rate of $5.00 per day).

After imposing sentence, the court informed the Defendant that he has a right to appeal with the assistance of an attorney; that if he is financially unable to afford an appeal, a record will be prepared for him at public expense and an attorney will be appointed to represent him; that an appeal must be taken within thirty (30) days of the date of entry of this judgment, and the clerk of the court will prepare and file a notice of appeal for him within that time if he so requests. Pending appeal, the defendant is ___✓___ remanded to custody; _____ released on bail in the amount of $_____

_____ If there are no fmdings of guilt shown above, the charges are hereby dismissed and the defendant is discharged.

Date: September 3, 2003 /s/ Atkins
Judge, Christian
Circuit Court

Judgment entered and noticed of entry served on the Defendant by hand-delivering a true copy to the Defendant's attorney of record, Mr. Richard Kip Cameron, 1611 South

Main Street, Suite 14, Hopkinsville, KY 42240, postage prepaid, on this the 4th day of September, 2003.

GARY J. HADDOCK, Clerk
By: /s/ C. [illegible]

NOTE TO CLERK: If Defendant is sentenced to death or confinement, give two certified copies of this judgment to the sheriff who delivers him to the institution. RCr 11.22.

SHERIFF'S RETURN

RENDERED: AUGUST 20, 2004; 10:00 p.m.
NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2003-CA-001951-MR

ROGER BERKE — *Appellant*

v.

COMMONWEALTH OF KENTUCKY — *Appellee*

Appeal from Christian Circuit Court
Honorable John L. Atkins, Judge
Action No. 02-CR-00280

OPINION—AFFIRMING

BEFORE: COMBS, Chief Judge; MINTON and VANMETER, Judges. COMBS, CHIEF JUDGE. Roger Alan Berke has appealed from the final judgment and sentence of imprisonment entered by the Christian Circuit Court on September 4, 2003, which convicted him of tampering with physical evidence. We affirm.

On July 19, 2002, Berke was indicted on eighteen (18) counts of using a minor in a sexual performance and on one (1) count of tampering with physical evidence by concealing evidence that he believed was about to be produced or used in an official proceeding. He was tried by a jury on August 4, 2003.

The Commonwealth introduced into evidence eighteen (18) photographs. These photographs graphically depicted Berke and a young victim engaged in a variety of sex acts. The photographs were recovered during the execution of a search warrant in Clarksville, Tennessee. Special Agent Jason Williams of the Tennessee Bureau of Investigation

testified that the photographs were found in a bank safety deposit box that had been leased by Berke on July 15, 2002.

At the close of the Commonwealth's case-in-chief, Berke moved for a directed verdict. He did not identify the charges upon which he based his motion nor the grounds upon which he believed he was entitled to relief. The trial court denied the motion.

Berke testified in his own defense. He admitted that he had initiated a sexual relationship with the victim when the victim was sixteen years of age and in need of food and shelter. But Berke denied that he had taken the explicit photographs before the victim's eighteenth birthday. Although he testified that he had been tipped-off about the impending search, he claimed that he had moved the explicit photographs from a storage unit in Hopkinsville to a safety deposit box in Tennessee in order to protect them from robbers and vandals. The jury acquitted Berke of the multiple counts involving the use of a minor in a sexual performance, but it convicted him of tampering with physical evidence. On September 4, 2003, the trial court entered its final judgment and sentenced Berke to serve five (5) years in the penitentiary. This appeal followed.

Berke argues on appeal that the trial court erred by denying his motion for a directed verdict. He contends that the evidence introduced by the Commonwealth at trial was insufficient to support his conviction for tampering with physical evidence. Berke asserts that in order to find him guilty of tampering with physical evidence, the jury had to be convinced that he believed at the time that he placed the photographs into the safety deposit box that an official proceeding was pending or might be instituted against him. Berke claims that the Commonwealth failed to prove this element of the offense beyond a reasonable doubt. The Commonwealth contends that the argument has not been properly preserved for our review, and we agree.

The record reflects that Berke's motion for directed verdict was general in nature. He did not identify the charges that he believed were pertinent to the motion nor did he specifically mention a lack of evidence as to any particular element of any of the charges. No mention was ever made of the Commonwealth's alleged failure to establish Berke's state of mind at the time that he placed the photographs into the safety deposit box (i.e., that an official proceeding was pending or might be instituted against him). Consequently, the trial court was never given an opportunity to address the question of whether there was a lack of evidence as to this element of the offense. Accordingly, this issue cannot be raised for the first time on appellate review. *McDonald v. Commonwealth,* Ky., 554 5.W.2d 84 (1977); *Anastasi v. Commonwealth,* Ky., 754 S.W.2d 860 (1988).

Additionally, and as the Commonwealth correctly notes, Berke failed to renew his motion for directed verdict at the close of all the evidence. A motion for a directed verdict not renewed at the close of all of the evidence cannot preserve issues of the insufficiency of the evidence for appellate review. *Kimbrough v. Commonwealth,* 550 S.W.2d 525 (1977). A defendant must renew his motion for a directed verdict, affording the trial court the opportunity to rule on the issue in light of all the evidence in order for it to be preserved for our review. *Baker v. Commonwealth,* 973 S.W.2d 54 (1998).

Nevertheless, even if we were to consider the merits of Berke's argument, we would be compelled to conclude that the Commonwealth presented evidence sufficient to overcome the motion for directed verdict. The testimony revealed that Berke was fully aware: (1) that allegations of criminal conduct had been made against him; (2) that his property was about to be searched; (3) that he had violated a court order by traveling to Clarksville, Tennessee, where he leased the safety deposit box at a bank with which he had never before done business; (4) that he attempted to disguise his identity as owner of the leased box; and (5)

that he utilized the box to deposit the photographs for safekeeping.

We must evaluate Berke's argument under the standard articulated in *Commonwealth v. Benham,* Ky., 816 S.W.2d 186, 187 (1991):

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal.

In this case, the evidence against Berke was quite sufficient to overcome his motion. Both direct and circumstantial evidence presented at trial indicated that Berke was aware that a criminal investigation against him had been launched and that he consequently transported the photographs to another jurisdiction in an effort to insure that the explicit photographs could not be recovered during a search of his premises. Berke's belief that criminal proceedings were about to be instituted against him was reasonably inferred from his actions and the surrounding circumstances. The jury was entitled to draw reasonable inferences from the evidence presented. The evidence was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Berke was guilty of tampering with physical evidence.

Therefore, we affirm the judgment of conviction.

ALL CONCUR.

BRIEF FOR APPELLANT:

David F. Broderick
P. Kevin Hackworth
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Natalie L. Lewellen
Assistant Attorney General
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SUPREME COURT OF KENTUCKY

2004-SC-775-D
(2003-CA-001951-MR)

ROGER BERKE — *Movant*

v.

COMMONWEALTH OF KENTUCKY — *Respondent*

Christian Circuit Court
2002-CR-280

ORDER DENYING DISCRETIONARY REVIEW

The motion for discretionary review of the decision of the Court of Appeals is denied.

Entered: January 12, 2005.

/s/ [illegible]
Chief Justice